2. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

3. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Mr. Shearn then added that he based his submissions on Lord Thankerton's third paragraph. He submitted the judgment of the learned trial Judge to a detailed and critical scrutiny but in my opinion Lord Thankerton's second paragraph is the one applicable to this appeal. The oral evidence in the case is completely contradictory; the exhibits completely baffled three so-called experts; and we did not find it possible, after long and careful comparison with other signatures, to pronounce definitely either that the promissory note was a forgery or that it was genuine. The learned trial Judge stated that the main reason for his decision was the opinion he had formed of comparative reliability of the witnesses. This is an advantage not possessed by this Court and in the circumstances I am of the opinion that this Court is "not in a position to come to any satisfactory conclusion" on the written evidence.

There remains one other point. It has already been stated that the second defendant was in Court during the hearing but was not called as a witness. Mr. Shearn submitted that under section 114 of the Evidence Ordinance, 1950, the trial Judge should have presumed that his evidence would have been unfavourable to the plaintiff. At first I entertained some doubt as to whether the plaintiff could call a defendant as his own witness, but this doubt was unfounded (*Price v. Manning*[2]). However, the facts of this case rebut any such presumption, as the second defendant had already admitted his joint liability to pay the plaintiff $60,000.

In my opinion this appeal fails and should be dismissed. The respondent should have his costs, and the sum of $500 deposited in Court should be paid out to respondent against his costs.

Thomson, J. : — I have had the advantage of reading the judgment of the Acting Chief Justice with which I agree. I do not wish to add anything.

Russell, J. : — I have had the advantage of reading the judgment of the Acting Chief Justice with which I agree. I do not wish to add anything.

Appeal dismissed.

MURUGIAH v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Thomson, J.) October 5, 1950]

[Ipoh — Criminal Appeal No. 66 of 1950]

Penal Code, s. 161 — Accused charged with three charges of receiving illegal gratification — Defence not called on one charge — Effect of acquittal on this charge on the trial of the other charges.

In this case the appellant was originally charged on three charges of taking gratification as a public servant in contravention of section 161 of the Penal Code. The first of these charges was dismissed and the case proceeded on the remaining two charges. At the end of the prosecution case, the learned President of the Sessions Court found that the appellant had no case to answer on the second charge and the appellant was acquitted on this charge. He also ordered that there was a case to answer on the third charge. The appellant thereupon proceeded with his defence and he was convicted and sentenced upon that charge. In his grounds of judgment, the learned President stated (inter alia) that he found as a fact that Lee Koi, that is the person concerned in the second charge, did give money to the appellant and this was one of the grounds on which he refused to accept the appellant's explanation in his defence.

Held, that as the appellant had been acquitted on the second charge, the learned President should have accepted this as establishing the innocence of the appellant on that charge and that he had misdirected himself in taking into consideration the evidence on the second charge and in relying on it in coming to his decision.

Cases referred to :—

(1) *Rex v. Plummer* (1902) 2 K.B. 339 at page 349.
(2) *Brannan v. Peek* (1947) 2 All E.R. 572.
(3) *Teja Singh and Mohamed Nasir v. Public Prosecutor* (1950) M.L.J. 71; 1 M.L.R. 26.

CRIMINAL APPEAL from the Sessions Court, Ipoh.

B. J. P. Joaquim (*M. N. Cumarasami* with him) for the appellant.

E. N. Griffith-Jones for the respondent.

The facts sufficiently appear from the Judgment.

Cur. Adv. Vult.

Thomson, J. : — This appellant was convicted in the Sessions Court at Ipoh on a charge of taking gratifications as a public servant in contravention of section 161 of the Penal Code. He was sentenced to six months' simple imprisonment and a fine of $1,500 or nine months' simple imprisonment in default of payment. Against that conviction and sentence he has now appealed.

A large number of grounds of appeal were argued with great force and persuasiveness by Mr. Joaquim, and I trust I shall not be regarded as lacking in appreciation of the assistance I have derived from Mr. Joaquim's argument if in view of certain conclusions at which I have arrived I do not deal in detail with all the grounds argued by him.

At the commencement of the trial there were three charges against the appellant to all of which he pleaded not guilty.

The first of these charges was dismissed on grounds which on the material before me I do not fully understand but which I propose to disregard as I am not here concerned with that charge.

The remaining two charges were as follows :—

"That you on or about the 4th day of April, 1950, at the District Hospital, Ipoh, being a public servant in the Medical Service of the Government of the Federation of Malaya, accepted a gratification other than legal remuneration, to wit, the sum of $7/- in cash, from the said Lee Koi s/o Lee Sui as a motive for doing an official act, namely, the giving of medical treatment, and thereby committed an offence punishable under Section 161 of the Penal Code."

"That you on or about the 4th day of April, 1950, at the District Hospital, Ipoh, being a public servant in the Medical Service of the Government of the Federation of Malaya, accepted a gratification other than legal remuneration, to wit, the sum of $10/- in cash, from one Wong Fook Heng s/o Wong Ngee, as a motive for doing an official act, to wit, the giving of medical treatment, and thereby committed an offence punishable under Section 161 of the Penal Code."

In broad outline the prosecution case on these charges was that the two persons named in them were opium addicts who were desirous of obtaining treatment for their condition at the Government Hospital in Ipoh. Such treatment is normally given free of charge on the part of the Government and it was the duty of the appellant as a Government Medical Officer to give it. In circumstances which do not appear on the record, the persons named in the charges were previously provided with marked notes by the Police and armed with these notes they proceeded to the appellant's consulting room at the Ipoh Hospital. There they both obtained some treatment for their condition and it is said that prior to receiving such treatment they paid to the appellant at his request sums of $7 and $10 respectively, the money in question consisting of the marked notes which the police had given them. Shortly afterwards Police Officers entered the consulting room and the notes in question, together with other money, were found in the trousers pocket of the appellant.

At the close of the case for the prosecution it was submitted that the appellant had no case to answer. For reasons which have not been stated, the learned President acceded to that submission in the case of the second charge but refused to accede to it in the case of the third charge.

Frankly, on the material before me I am unable to understand how the learned President could possibly have arrived at both these conclusions. Lee Koi had given evidence that he had paid money to appellant on appellant's request in the presence of Wong Fook Heng and that Wong Fook Heng had paid money to the appellant in his presence. Similarly, Wong Fook Heng had given evidence that he gave money to the appellant in Lee Koi's presence and that Lee Koi gave money to the appellant in his presence. As regards both payments there were minor discrepencies between the evidence of the witnesses which may or may not have affected the value of that evidence. There was, however, no room for doubt that both of them were testifying as to the same alleged occurrences which took place on the same occasion and I wholly fail to see how their evidence could be discarded as to one of these occurrences and yet be regarded in relation to the other as so substantial as to justify the learned President in saying in effect that if unrebutted it would justify the conviction of the appellant.

Nevertheless, the learned President did in fact find that on the second charge the appellant had no case to answer. That finding has not been appealed against by the prosecution and the position as regards it is therefore governed by section 173 (f) of the Criminal Procedure Code which reads as follows :—

"If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal"

The necessary order of acquittal on the second charge was recorded.

Thereafter the appellant proceeded with his defence on the third charge and was convicted and sentenced upon that charge.

The learned President in his grounds of judgment has set out the grounds on which he convicted the appellant on the third charge and I feel bound to say that in my opinion these show he failed adequately to appreciate the effect of the acquittal of the appellant on the second charge. It may well be argued that they show that he felt he had made a mistake in acquitting him upon that charge, but in this connection it must be borne in mind that by the time he had proceeded to conviction on the third charge he had listened to the evidence of the appellant himself and of his witnesses, a body of evidence which could hardly be described as bearing the badge of candour. Nevertheless, the appellant had been acquitted on the second charge and whether doubt was cast on the correctness of that acquittal by a reconsideration of the prosecution evidence or by the nature of the defence evidence, he was entitled to the benefit of that acquittal; as regards

the second charge he was entitled to be regarded as an innocent man. On that point I would quote the observations of Bruce, J. in the case of *Rex v. Plummer*[1] to the effect that:—

> "I think it is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates."

Putting it at the very lowest from the appellant's point of view the learned President should have disregarded so much of the evidence as tended to show that the appellant was guilty on the second charge. He should have applied his mind exclusively to so much of the evidence as tended to show that he was guilty on the third charge, and if on a consideration of that evidence he had found himself compelled to the conclusion that the accused was guilty on the third charge I greatly doubt if his conclusion to that effect could have been seriously attacked.

But he did not do this. He found as a fact that Lee Koi, that is the party concerned in the second charge, did give money to the appellant on 4th April, and at a later stage he described that money as "demanded money", and I do not think it is putting an unfair construction on what he has said to say that that was one of the grounds on which he refused to accept the appellant's explanation which he was bound to regard as the defence to the third charge.

In the circumstances, I am bound to say that he seriously misdirected himself and as on the material before me I am quite unable to say at what conclusion he could have arrived at had he directed himself correctly, the conviction cannot stand and must accordingly be quashed.

Before departing from the case I think there is one thing I should add in fairness to the Police Officers concerned in the case. Reference has been made to the case of *Brannan v. Peek*[2] and certain strictures passed by the Lord Chief Justice of England on the conduct of certain Police Officers. I am of course well aware of what was said regarding that case in the local case of *Teja Singh v. Public Prosecutor*[3] with which, with respect, I am in entire agreement. I feel, however that I should make it clear that the facts in this case are poles apart from the facts in *Brannan v. Peek*[2]. That was a case where a Police Officer was sent by his superiors to invite a bookmaker to commit a criminal offence and went to considerable lengths to do so. In the present case the facts were entirely different. The prosecution witnesses were genuinely in need of medical treatment the provision of which was a perfectly proper and indeed beneficial act on the part of the appellant. There was, however, some ground for suspecting that the appellant would not provide that treatment unless he received some illegal gratification and all the Police Officers concerned did was to ensure that if he did in fact demand and receive an illegal gratification a certain amount of evidence to assist in his prosecution would be available. There was no question of provoking or inviting appellant to commit an offence. He was invited to do something perfectly lawful, that is treat the witnesses. To take anticipatory steps to have evidence available in the event of his going beyond what was lawful was a matter of common prudence.

Appeal allowed.